BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD
STATE OF CALIFORNIA

GALLO VINEYARDS, INC., Employer, <and> UNITED FARM WORKERS, AFL-CIO, Charging Party.	CASE NOS. 03-CE-9-SAL & 03-CE-9-1-SAL

MOTION OF ROBERTO PARRA FOR LEAVE TO FILE RESPONSE TO PUBLIC NOTICE AND REQUEST FOR WRITTEN ARGUMENT OUT OF TIME

COMES NOW Roberto Parra, by his undersigned counsel, and respectfully moves the Board for leave to file his written argument, attached hereto, out of time, as follows:

1. On 18 June 2004, the Board issued, and on 13 July, revised, its Notice of Opportunity to Provide Written and Oral Argument in response to three questions raised in the above-referenced cases. The aforesaid notice and its revision set a deadline for submission of written comments for Monday, 2 August 2004.

2. The above-referenced cases address alleged unfair labor practices committed by Respondent Gallo Vineyards, Inc., in related to a petition for decertification filed by Roberto Parra in Case No. 03-RE-2-SAL, and the election held subsequent thereto on 13 March 2003. The ballots for the aforesaid election have not been counted as of this date.

3. Parra is not a party to the above-captioned proceedings. He was not provided with specific notice of the Board's request. Nevertheless, independent of these proceedings, and subsequent to the deadline for submission of written argument, he retained counsel to represent

him in his related but independent proceeding, executing a retainer with his undersigned counsel on 22 August 2004. Prior to that time, he was unrepresented.

4. Parra's manifest interest in these proceedings, the Board's failure to notify him specifically of its request for comments, and his recent retention of counsel are factors which make receipt and consideration of his tardy comments just, but not prejudicial to these proceedings.

WHEREFORE, Parra respectfully requests that the Board accept and consider his written comments, attached hereto, in these proceedings.

DATED: 8 September 2004

Respectfully submitted,

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BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD
STATE OF CALIFORNIA

GALLO VINEYARDS, INC., Employer, <and> UNITED FARM WORKERS, AFL-CIO, Charging Party.	CASE NOS. 03-CE-9-SAL & 03-CE-9-1-SAL

ROBERTO PARRA'S WRITTEN ARGUMENT IN RESPONSE TO BOARD'S PUBLIC NOTICE AND REQUEST FOR WRITTEN AND ORAL ARGUMENT

This brief responds to the Notice of Opportunity to Provide Written and Oral Argument issued by the Board on 18 June 2004, and revised on 13 July 2004. Said notices solicit comments from "any person" on questions arising in the context of the above-referenced proceedings before the Board. Specifically, the Board solicits comments on the following questions:

> 1) What are the existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, *i.e.*, is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?
> 2) Do the factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?
> 3) Are NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee initiated decertification petitions?

Recipients of the Notice were invited to forward written submissions to the Board's

Executive Secretary postmarked not later than 2 August 2004. For the reasons stated in the Motion accompanying this submission, Roberto Parra respectfully submits his written comments out of time, and requests that they be considered by the Board.

I. INTERESTS OF ROBERTO PARRA

The Board's Notice of Opportunity to Provide Written and Oral Argument issued by the Board on 18 June 2004, and revised on 13 July 2004, involves unfair labor practice charges against an employer, Gallo Vineyards, Inc. ("GVI"), against whom proceedings have been pursued before the Board. Case Nos. 03-CE-9-SAL & 03-CE-9-1-SAL. Administrative Law Judge Nancy C. Smith heard evidence on those charges in late June and early July 2003, and subsequently issued a 58-page decision.

Roberto Parra is an individual employed by GVI, in a bargaining unit of employees represented, solely for purposes of collective bargaining, by the United Farm Workers, AFL-CIO ("UFW"). Parra filed a timely petition for decertification in Case No. 03-RE-2-SAL on 6 March 2003, and an election was duly conducted on 13 March 2003. The ballots for the aforesaid election were immediately impounded by the Regional Director.

On 20 March 2003, the UFW, by its counsel, filed objections to the election, but failed to duly serve them upon the other parties to the proceeding. On 1 April 2003, GVI, by its counsel, responded to those objections, seeking to have them dismissed because of the UFW's failure to properly serve them. Each side subsequently filed another brief, and the briefing was concluded by 18 April 2003. Nearly fourteen months later, on 2 August 2004, the General Counsel issued an order directing the Regional Director to open and count the impounded ballots, and to serve an

official tally on the parties. However, two days later, on 4 August 2004, the Board issued an Order, by its Executive Secretary, directing that "the ballots ... shall remain impounded until further order of the Board," and mandating that the Regional Director "shall take no action with regard to the adequacy of the showing of interest in support of the decertification petition ... absent further order of the Board" in the above-referenced case.

In the meantime, on 3 March 2003, the UFW initiated unfair labor practice charges in Case Nos. 03-CE-9-SAL and 03-CE-9-1-SAL, alleging that GVI had illegally solicited, encouraged, promoted, and/or provided assistance in the initiation, signing, and/or filing of a decertification petition, alleging that its filing was imminent, and requesting immediate injunctive relief.[1] The Regional Director issued Complaint on 14 April 2003, alleging that one of GVI's employees was a supervisor who engaged in the illegal conduct. The UFW intervened in the action, and the case was tried in late June and early July on the General Counsel's amended Complaint. ALJ Smith's decision finds against GVI, and recommends dismissal of Parra's decertification petition.

Parra's interests in these proceedings is obvious. Without regard to the ultimate merits of the case, Parra's petition for decertification lives or dies based upon the outcome of the above-styled proceedings specifically, which in turn will likely be resolved by virtue of the Board's determination on these issues. Under these circumstances, Parra is an individual profoundly to be impacted by these proceedings.

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[1] The original charge was filed naming "Gallo of Sonoma" as the employer. The Charge was amended ten days later, on 13 March 2003, and given Case No. 03-CE-9-1-SAL, substituting GVI.

II. ARGUMENT

This Board views "the effectuation of employee free choice as one of its fundamental goals." *Mann Packing Company, Inc.*, 16 ALRB No. 15, at 3 (1988). With that principle in mind, the question become how to measure "employee free choice." In answer to that question, the National Labor Relations Board has held that its conduct of elections "in a laboratory under conditions as nearly ideal as possible to determine the uninhibited desires of employees" providing "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice," is among the "crown jewels of this nation's practice of industrial democracy." **See** *Ray Brooks v. NLRB*, 348 U.S. 96, 99 (1954). The Supreme Court in *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 602 (1969), emphasized that "secret ballot elections are generally the most satisfactory, indeed the preferred method of ascertaining whether a union has majority support." It is therefore ironic indeed that apologists for a labor union safely ensconced with the monopoly bargaining privilege granted by the Agricultural Labor Relations Act, CAL. LABOR CODE § 1156, are attempting here to frustrate employee free choice by avoiding an election, and perhaps, the embarrassment of what a counting of the ballots already taken would show. But much like George Orwell's *Animal Farm*, where some animals "are more equal than others," there are those for whom some choices "are more equal than others."

With these principles in mind, it is the Board's solemn duty and obligation to ensure that employees' desires concerning representation, when expressed freely, are realized, and the most accurate measure of the employees' free choice is the results of an election. It is in this context

that the questions presented in the Board's Notice of Opportunity to Provide Written and Oral Argument issued by the Board on 18 June 2004, and revised on 13 July 2004, are properly considered.

A. Question 1 — What are the existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, *i.e.*, is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

As to this question, Parra adopts the positions taken and argued by GVI, Excelsior Farming, L.L.C., and the General Counsel. Dismissal of a decertification election petition is an extreme remedy as it deprives the employees who file the petition of the opportunity to have the issue of union representation decided by a secret ballot election. Because this is the case, a reflexive, *per se* rule requiring dismissal and/or setting aside of an election is unwarranted, and would extinguish important employee rights, as well as result in situations where the most minimal and innocent of employer interference would result in defiance of employee will expressed at the ballot box. Therefore, the Board must, like its national counterpart, apply an objective standard which seeks to determine whether the assistance was such that it would tend to interfere with employee free choice and affect the results of the election. Thus, while an employer cannot lend more than minimal approval and support of the petition, *Eastern States Optical Co.*, 275 NLRB 371 (1985), more than such token support of the petition is required before a petition is dismissed.

Moreover, it is important to take account of the differing contexts in which such

questions arise. In the context of this unfair labor practice proceeding, the burden is to demonstrate a causal connection between the alleged unfair labor practices and employee disaffection. *D & D Enterprises, Inc.*, 336 NLRB No. 76 (2001). In the context of objections to an election, the union must meet a heavy burden of demonstrating that the assistance interfered with employee free choice and affected the results of the election.

B. Question 2 — Do the factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

This question asks whether the factors listed in the referenced decision may be taken out of their context and applied to situations such as that presented by this case. The short answer to that question is that they may be applied to this context, but that the standards adopted by the NLRB in *Overnite* rarely require the setting aside of a petition and election, a drastic remedy which ignores they varying degrees of taint and wrongdoing which are at the core of the NLRB's analysis.[2]

In *Overnite Transportation Co.*, the NLRB held that:

> The Board generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the petition itself. The Board considers conduct that taints the showing of interest, precludes a question concerning representation, or taints an incumbent union's subsequent loss of majority support to be inconsistent with the petition.
>
> Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition. There must be a causal

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[2] Of course, the General Counsel correctly observes the legal truism that this Board is "free to follow any NLRB precedent it deems applicable in the conte[x]t of agriculture." General Counsel's Submission, page 7, **citing** CAL. LABOR CODE § 1148.

> connection. In cases involving a complaint alleging an 8(a)(5) refusal to recognize and bargain with an incumbent union, the causal relationship between the allegedly unlawful act or acts and any subsequent loss of majority support or employee disaffection may be presumed. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), **affd. in part and remanded in part** 117 F.3d 1454 (D.C. CIR. 1997); *Sullivan Industries*, 322 NLRB 925, 926 (1997). Where a case involves unfair labor practices other than a general refusal to recognize and bargain, a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed. **See** *Lee Lumber*, 322 NLRB at 177; *Williams Enterprises*, 312 NLRB 937, 939 (1993), **enfd.** 50 F.3d 1280 (4TH CIR. 1995).
>
> To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection with an incumbent union, the Board in *Master Slack Corp.*, *supra*, identified several relevant factors. These factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition or filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB at 84. **See** *Lee Lumber*, 322 NLRB at 177 fn. 16; *Williams Enterprises*, 312 NLRB at 939.

Overnite Transportation Company, 333 NLRB No. 166, *2. With these principles in mind, a few clear guidelines emerge. First, "Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition." *Id.* Indeed, application of these factors strongly suggests that such taint is the exception, and not the rule, as the necessary "causal connection" will be rare. In *Overnite* itself, the conduct at issue was "serious and pervasive," "nationwide," "highly coercive," and "numerous." *Id.* at *4-5.

In its Notice of Opportunity to Provide Written and Oral Argument issued by the Board on 18 June 2004, and revised on 13 July 2004, the Board cautioned against discussion of the facts of this case, but it should be noted that *Overnite* is a highly fact-sensitive analysis, making it difficult to fully assess that decision's application to this context. Moreover, neither Parra nor

his counsel were parties to or participants in this proceeding. However, based upon our understanding of ALJ Smith's decision and the facts of this case, the outcome of *Overnite* is not appropriate in this case, as *Overnite* requires a much higher and pervasive level of employer misconduct to justify the type of drastic remedy applied in that case.

C. Question 3 — Are NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee initiated decertification petitions?

As to this question, Parra adopts the positions taken and argued by GVI. It is clear that the NLRB cases on this issue are not directly applicable in a statutory framework which, as the General Counsel rightly notes, more severely limits the means of recognition and employer conduct toward certified monopoly bargaining representatives. However, the NLRB cases provide a useful framework for analysis as to what constitutes conduct which sufficiently taints a decertification petition.

IV. CONCLUSION

In most important ways, the ALRA parallels the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, particularly in its fidelity to the Board-conducted, secret-ballot election as the purest form of expression of employee free choice. Yet the unfortunate and unintended by-product of these proceedings has been to completely frustrate employee free choice, impeding even the effort to ascertain what expressions have been made by the employees whose rights are at issue. Ultimately, what the Supreme Court said about the NLRA is equally true about the

ALRA: by "its plain terms ... the NLRA confers rights only on employees, not on unions ...." *Lechmere Inc. v. NLRB*, 502 U.S. 527, 532 (1992); **see also** *MGM Grand*, 329 NLRB. 464, 475 (1999) (Member Brame, dissenting) ("employees do not exist to ensure the survival or success of unions"). This distinction between employees and the unions which represent, or purport to represent, them is frequently lost in the often bi-polar considerations of employment relations. Dismissal of the petition in this case requires a showing not possible or plausible on this record, one not now advocated by the General Counsel in pursuing the charge.

DATED: 6 September 2004

Respectfully submitted,

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